

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

REPLY COMMENTS OF SECURUS TECHNOLOGIES, INC.

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SUMMARY

The record in this proceeding does not provide the Commission with solid ground on which to make the drastic rate reductions that the Wright Petitioners request. The Siwek Report demonstrated that the \$0.25/\$0.20-per minute rate caps would be confiscatory in the vast majority of the sites that Securus serves, and no commenter has submitted a credible study to refute that report. In fact, the only independent study submitted thus far was sponsored by the Wright Petitioners, in comments joined by several public interest entities, and that study is deeply flawed in both its analysis and its assumptions.

What is clear, however, is that correctional authorities rely on secure, sophisticated calling systems and are concerned that the Commission's actions in this proceeding will threaten the integrity of those systems. Several correctional agencies and associations wrote to urge the Commission not to cut rates in a manner that would deprive them of the safety and security features on which they rely or of the site commission revenue that is so badly needed for prison operations and inmate welfare.

Site commissions predictably figure prominently in the comments. Unfortunately, they are mischaracterized and dismissed as being “profit” or easily replaced with general tax revenue. Their importance to societal welfare is all but ignored, whereas hypothetical benefits from slashed calling rates – such as reduced recidivism – are not only promised but lionized. Securus and its economic expert, Stephen Siwek, address these matters in detail herein.

What cannot be disputed is that there are some aspects of inmate telecommunications that are under our control, and some that are not. The authority of public agencies to engage in public bidding and execute contracts is not within the reach of this

proceeding. The Commission's authority to regulate telecommunications cannot be extended to financial transactions carried out by third parties. Rates for most TTY calls are not set, collected, or kept by inmate telecommunications service providers.

As Securus has explained, the issues surrounding inmate telephone calls are complex and in many ways are out of our hands. These issues are, rather, often in the hands of corrections and enforcement officials that must balance the needs of inmates, friends and family, judges, victims, witnesses, and the general public. The Commission should recognize the importance of reserving penological policy to their capable hands.

With regard to the calling rates which the Commission has jurisdiction and authority to address, it is beyond argument that they must not be confiscatory and must be reasonably derived. Here, the Commission is faced with a rate proposal that fails in both these regards.

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Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.415, files these Reply Comments in response to the Notice of Proposed Rulemaking released on December 28, 2012, in this docket (“NPRM”).¹ As shown herein, the record in this proceeding does not support adoption of the rate caps that the Wright Petitioners propose.²

I. THE RECORD DEMONSTRATES THAT THE SECURITY NEEDS OF CORRECTIONAL AUTHORITIES ARE PARAMOUNT

In its Comments, Securus provided the Commission with a summary of previous filings by correctional agencies who explained the importance of having secure calling platforms in facilities.³ Several more correctional agencies now have responded to the NPRM. The Louisiana Department of Corrections succinctly asserts that “[t]he primary function of La. DOC is public safety.”⁴ The South Dakota Department of Corrections (“SD DOC”) states that “[s]ecurity at our prisons is first and foremost.”⁵ The California Department of Corrections and Rehabilitation emphasizes “the crucial public safety and institutional security implications” involved in this proceeding.⁶ And the National Sheriffs’ Association states that

[I]t is imperative in this FCC rulemaking that Sheriffs continue to have control over and the ability to monitor – via cost-effect rate structures and a practical phone system – the communications that inmates have with others outside of the jail! There are dangerous

¹ WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, 27 FCC Rcd. 16629 (2012).

² CC Docket No. 96-128, Petitioners’ Alternative Rulemaking Proposal of Martha Wright, *et al.* (Mar. 1, 2007) (“Wright Petition”).

³ WC Docket No. 12-375, Comments of Securus Technologies, Inc. at 3-4 & Exhibits 1 through 4 (Mar. 25, 2013) (“Securus Comments”).

⁴ WC Docket No. 12-375, Comments on Proposed Rule Making by the Louisiana Department of Public Safety & Corrections at 1 (filed Mar. 25, 2013) (“LA DOC Comments”).

⁵ WC Docket No. 12-375, Letter from Dennis Kaemingk, Cabinet Secretary, SD DOC, to Marlene H. Dortch, FCC, at 2 (Mar. 21, 2013) (“SD DOC Letter”).

⁶ WC Docket No. 12-375, Letter from Benjamin T. Rice, General Counsel to Cal. Dept. of Corr. and Rehab., to Marlene H. Dortch, FCC, at 2 (Mar. 25, 2013) (“Cal. DCR Letter”).

individuals in local jails who, via ICS, try to continue their criminal activities on the outside while they are incarcerated.... Inmates contact witnesses with wrongful intent. They call their victims. They plot and plan criminal enterprises. And these ICS events take place with startling regularity, literally every day.⁷

Commenting agencies urged the Commission not to take action in this proceeding that would imperil their ability to obtain and use the secure systems, which inherently include investigative technology, that they presently have. The SD DOC noted that “[w]hen we look at an ICS, we look for the advancements in security technology.”⁸ The California DCR fears that the drastic rate-cutting proposed by the Wright Petitioners would jeopardize its ability to obtain state-of-the-art technology, like the Global Tel*Link Managed Access System, and on that basis opposes “a nationwide rate cap on interstate calling rates.”⁹ The California State Sheriffs’ Association similarly states that the rate regulation proposed here “would seriously hamper the ability of California Sheriffs to effectively secure and manage their jails.”¹⁰

A recent experience of Securus provides valuable, real-world evidence of the importance of secure calling systems. As explained in the attached Declaration of Kelly Solid, who is the General Manager of Direct Hit Systems, Inc., a Securus company, “[i]n just the last two weeks” a large correctional authority requested special assistance in investigating a “string of major crimes.”¹¹ Specifically, the agency asked for special training in using proprietary software that it obtained from Securus, called “THREADS”, which is a “set of algorithms that

⁷ WC Docket No. 12-375, Letter from Sheriff Larry D. Amerson, President of Nat’l Sheriffs’ Ass’n, to Marlene H. Dortch, FCC, at 1 (Mar. 25, 2013) (“NSA Letter”) (emphasis added).

⁸ SD DOC Letter at 2.

⁹ Cal. DCR Letter at 1.

¹⁰ WC Docket No. 12-375, Letter from Keith Royal, President, Cal. State Sheriffs’ Ass’n, to Marlene H. Dortch, FCC, at 1 (Mar. 22, 2013) (“Cal. SSA Letter”).

¹¹ Declaration of Kelly Solid ¶ 5 (Apr. 17, 2013).

find correlations and patterns in data, and specifically inmate call data.”¹² In that investigation, “THREADS produced analysis that assisted the agency[.]”¹³

Inmate telecommunications are an intrinsic part of the security systems that protect both inmates and the general public. We know that the Commission is mindful of this fact.¹⁴ Its significance should not be lost among the calls for adopting low rates for inmate calls regardless of the resulting societal cost.

II. THE RECORD DEMONSTRATES, AND THE WRIGHT PETITIONERS EXPRESSLY ACKNOWLEDGE, THAT MEANINGFUL COMPETITION EXISTS IN THE INMATE TELECOMMUNICATIONS INDUSTRY

Securus stated in its Comments that “[t]he competition for service contracts is, to put it mildly, robust.”¹⁵ It provided evidence that, in its experience, the Request for Proposal bidding process typically involves no less than four and as many as seven competing firms.¹⁶ The level of calling rates is a prime concern for the procurement agencies and correctional authorities who evaluate contract bids.¹⁷

Several commenters provided similar evidence. The South Dakota DOC states that it uses the public bidding process “to increase competition and keep the calling rates down for inmates and their families.”¹⁸ It also has “worked diligently with its phone system

¹² Solid Decl. ¶ 3.

¹³ *Id.* ¶ 4.

¹⁴ See NPRM ¶ 6; see also CC Docket No. 92-77, *Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 FCC Rcd. 6122, 6156 ¶ 57 (1998) (recognizing “the special security requirements applicable to inmate calls”).

¹⁵ Securus Comments at 2.

¹⁶ *Id.* at 2 (citing Declaration of Curtis L. Hopfinger ¶ 4 (Mar. 25, 2013)).

¹⁷ *Id.* at 2 (citing Hopfinger Decl. ¶ 5).

¹⁸ SD DOC Letter at 2.

provider(s) to lower the rates upon contract renewal.”¹⁹ Securus does not serve the South Dakota DOC and has no independent knowledge of the rates there, but the Comments of the Human Rights Defense Center (“HRDC”) state that 15-minute debit and prepaid calls from the SD DOC are only \$2.70.²⁰

The Indiana Utility Regulatory Commission (“IURC”) explains that “when considering a contract for inmate calling services, state law requires the Indiana Department of Administration” to consider “the goal of reducing the total cost of a telephone call placed by a confined offender by soliciting competitive proposals that emphasize lower per call service charges; per minute rates; and commission rates.”²¹

Stephen Siwek, who has written a Report and a Rebuttal Report on behalf of Securus in this docket, provides his expert opinion on the role of competition in this industry. He states that the public bidding mechanism, which draws multiple bidders for every contract, necessarily affects the conduct of market participants: “each also knows that if it submits a bid that is likely to result in revenues higher than its costs (which include a normal competitive profit), it risks being underbid by a rival and thus losing the contract.”²² He notes that “[t]his is essentially the same process that is used by purchasers in many industries to obtain the goods or

¹⁹ SD DOC Letter at 2.

²⁰ WC Docket No. 12-375, Comments of the Human Rights Defense Center, Exhibit B (Mar. 25, 2013). Global Tel*Link Corporation states that several rates reported in April 2011 by Prison Legal News, which is operated by the same person who founded the HRDC, are incorrect. Exhibit B to the HRDC indicates that it was compiled more recently. Securus has no basis to verify any rate in Exhibit B for correctional facilities, like the SD DOC, that Securus does not presently serve.

²¹ WC Docket No. 12-375, Comments of the Indiana Utility Regulatory Commission at 2 (Mar. 25, 2013).

²² WC Docket No. 12-375, Expert Rebuttal Report of Stephen E. Siwek on Behalf of Securus Technologies, Inc. ¶ 2.2 (Apr. 22, 2013) (“Siwek Rebuttal Report”).

services that the buyer prefers at the lowest possible price.”²³ Having reviewed the Declaration of Coleman Bazelon that was sponsored by a group led by the Wright Petitioners,²⁴ Mr. Siwek questions Bazelon’s “distorted picture of competition among ICS providers,” an error that pervades and undermines the other conclusions in the Declaration as we explain below.²⁵ See Section III.A., *infra*.

In fact, this fundamental tenet of Dr. Bazelon’s report is contrary to the position of the Wright Petitioners themselves. The Wright Group Comments state that “there is already active competition to provide ICS services.”²⁶ That “active competition” is, as Securus shows, pushing down inmate calling rates.²⁷ The record thus demonstrates that the market has not failed, that the public bidding process is working, and thus Commission intervention is not warranted.²⁸

III. THE RECORD DOES NOT SUPPORT ADOPTION OF THE RATE CAPS THAT THE WRIGHT PETITIONERS PROPOSE

The Wright Petitioners request adoption of a rate cap for interstate inmate-initiated calls that is \$0.25 per minute for collect calls and \$0.20 per minute for debit and prepaid

²³ Siwek Rebuttal Report ¶ 2.2.

²⁴ WC Docket No. 12-375, Comments of Martha Wright, *et al.*, the D.C. Prisoners’ Legal Services Project, Inc., Citizens United for Rehabilitation of Errants, Prison Policy Initiative, and the Campaign for Prison Phone Justice, Exhibit C (Mar. 25, 2013) (“Wright Group Comments”).

²⁵ Siwek Rebuttal Report ¶ 2.1.

²⁶ Wright Group Comments at 27 (quoting their *ex parte* letter to the FCC in CC Docket No. 96-128 dated November 5, 2009).

²⁷ Securus Comments at 5-7.

²⁸ See Securus Comments at 14-15 (quoting, *inter alia*, CC Docket No. 96-61, *Policy and Rules Concerning the Interstate Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd. 20730 (1996); PR Docket No. 94-109, *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, Report and Order, 10 FCC Rcd. 7842, 7851 ¶ 37 (1995)).

calls; no per-call charge would be permitted.²⁹ As shown by the Siwek Report, those rates are demonstrably below cost for a large proportion of the facilities that Securus serves.³⁰ The \$0.07 rate that Carlton Bazelon, the Wright Petitioners' economist, now demands would be below cost at all but a few mega-facilities that have astronomical call volumes.

In addition to being confiscatory, the Wright Petitioners' proposal is not supported by sound economic theory or credible positions. Both the Petitioners and Dr. Bazelon take positions and advance theories that are unrealistic, belied by the evidence, or otherwise unreasonable. These infirmities provide even further reason for the Commission to reject the proposed rate caps.

A. Site Commissions Are Not Profit

The Commission has not held that site commissions paid to correctional facilities in accordance with state statute or contractual obligation are profit. In the *2002 Inmate Rate NPRM*,³¹ the Commission related its separate finding regarding public payphones, stating that “[t]he Commission has previously described in detail the economic principles that control payphone telephony.”³² Among these economic principles is that “a payphone that ‘earns just enough revenue to warrant its placement, but not enough to pay anything to the premises owner’ is ‘a viable payphone ... because the payphone provides increased value to the premises.’”³³ That “added value” principle simply does not apply to correctional facilities which are

²⁹ NPRM ¶ 17.

³⁰ Siwek Report ¶¶ 3.1-3.8 & Tables 2 and 3.

³¹ CC Docket No. 96-128, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd. 3248, 3262 (2002).

³² *2002 Inmate Rate NPRM*, 17 FCC Rcd. at 3254 ¶ 15.

³³ *Id.*, 17 FCC Rcd. at 3255 ¶ 15 (citation omitted).

government-owned and have no need of market valuation. Thus, whereas in the public payphone context “location rents are not a cost of payphones, but should be treated as profit,”³⁴ in the prison context site commissions are a direct cost of doing business for inmate telephone service providers.

If the Commission had already decided that site commissions are “profit”, it would not have issued requests for comment in the *2002 Inmate Rate NPRM* asking how site commissions should be treated with regard to rate structure:

On the other hand, higher commissions may give confinement facilities a greater incentive to provide access to telephone services. Commission proceeds may be dedicated to a fund for inmate services or assigned to the state’s general revenue fund. We seek comment on commissions demanded by correctional institutions, whether and how any states have addressed the relationship between these commissions and inmate calling rates, and on any factors unique to the provision of inmate calling services that affect the profitability of ICS operations.

17 FCC Rcd. at 3276-77 ¶ 73.

If site commissions were “profit” to service providers, the Commission would not have asked how they *affect profitability*. To the contrary, the Commission recognized that site commissions are a *cost* to the provider and thus necessarily *decrease profitability*.

Mr. Siwek concludes without reservation that “[a] site commission is a cost to an ICS provider, not a form of provider profit.”³⁵ He explains that

ICS providers receive a competitive profit which is the difference between revenues and all costs, including the cost of site commissions. **Revenue which the ICS provider pays to a prison is not “profit” to that provider.**³⁶

³⁴ *2002 Inmate Rate NPRM*, 17 FCC Rcd. at 3255 ¶ 15.

³⁵ Siwek Rebuttal Report ¶ 2.4

³⁶ *Id.* ¶ 2.6 (emphasis added).

The Wright Petitioners Group erroneously asserts that site commissions constitute “profit sharing”.³⁷ That label has no application here. Service providers do not “share” site commissions, they pay them.³⁸ To state otherwise is simply to ignore reality.

And the most damning argument against the “site commission is profit” position comes from the Wright Petitioners themselves. The Wright Petitioners refer to their repeated criticisms of the industry-sponsored study by economist Don Wood that was filed in 2008.³⁹ That study relied on the “marginal location methodology” which the Commission employs for public payphones; it assumes away all location rents and does not include them as a cost input to service. The Wright Petitioners state (along with their several co-commenters) that they “have previously addressed, at length, the inapplicability of the marginal location methodology contained in the Wood study.”⁴⁰ Their rationale is that “the marginal location methodology is irrelevant in the ICS context, demonstrating that the purported goal of ‘promoting widespread deployment’ **does not apply since there is already active competition to provide ICS services.**”⁴¹

The Wright Petitioners thus do not believe it is appropriate for the Commission to ignore or factor out site commissions as a cost of service. This position is the sensible approach. Accordingly, site commissions should not be viewed as “profit” to service providers, and service

³⁷ Wright Group Comments at 21.

³⁸ See Siwek Rebuttal Report ¶ 2.6.

³⁹ CC Docket No. 96-128, Inmate Calling Services Interstate Call Cost Study (Aug. 15, 2008). The Commission refers to this report as the “ICS Provider Proposal”. *E.g.*, NPRM ¶ 24.

⁴⁰ Wright Group Comments at 27.

⁴¹ *Id.* (quoting *Ex Parte* submission, November 5, 2009, at 4) (emphasis added).

providers must be able to recover the *cost* of site commissions in order to avoid unlawful, below-cost rates.⁴²

B. Suppositions About Demand Elasticity Are Unreasonable and Unsupported

The Bazelon Report includes purported analysis of demand elasticity in inmate telecommunications service.⁴³ This analysis relies on one data point: New York state correctional institutions after former Governor Elliot Spitzer abolished site commissions for those sites. His conclusion should not be credited, for two fundamental reasons.

First, in sound economic analysis, “a reliable estimate of demand elasticity cannot be drawn from a single observation.”⁴⁴ Rather, elasticity analysis requires “statistical techniques such as regression analysis to control for other factors that could affect call usage, including prison population, prison regulations on phone usage, the distance between prisoners and their home communities, and seasonal factors.”⁴⁵ In addition, it should account for “level of prices before a change and on the magnitude of the change”, because “elasticity of demand may not be constant along the entire demand curve.”⁴⁶

Secondly, Dr. Bazelon does not correlate the perceived price decrease at New York state prisons properly to the perceived increase in demand. By simply reviewing the relevant dates, Steve Siwek realized that

Prices were reduced in April 2007, and reduced again in October.
The 36% increase in usage that occurred in April-September could

⁴² Securus Comments at 7 (“rates set by the Commission must include a reasonable profit after accounting for the costs that the carrier incurs in providing service”) (citing *Jersey Central Power & Light Co. v. Fed. Energy Reg’y Comm’n*, 810 F.2d 1168, 1178 (D.C. Cir. 1987)).

⁴³ Bazelon Report ¶¶ 44-45.

⁴⁴ Siwek Rebuttal Report ¶ 4.2.

⁴⁵ *Id.*

⁴⁶ *Id.*

not have resulted from a 57.5% decrease because part of the decrease did not occur until after September.⁴⁷

This error means that Dr. Bazelon underestimated the purported price elasticity derived from this New York experience.⁴⁸

As a result, Dr. Bazelon's elasticity calculation is in error. He calculates elasticity as $36\% / -57.5\% = -0.63$.⁴⁹ As Mr. Siwek points out in his Rebuttal Report, the price reduction actually was 50%, and thus the correct calculation is $36\% / -50\% = -0.72$.⁵⁰ Dr. Bazelon's analysis is thus further discredited.

The inmate telecommunications industry is not amenable to reliable demand elasticity studies. The changing of contracts and the unique cost and service characteristics of each institution are not easily normalized into one price change / traffic change calculation. Dr. Bazelon's attempt to provide a demand elasticity factor for this industry therefore fails. As such, his Report is of little value to the Commission.

C. Suppositions About Societal Welfare Are Unfounded and Ignore the Effects of Depriving Correctional Agencies with Much-Needed Revenue

Dr. Bazelon also asserts that slashing interstate inmate calling rates – he actually proposes a rate of \$0.07 per minute on all calls – has “at least 2 social externalities” in form of “the benefits of reduced recidivism” and “more effective prisoner management”.⁵¹ This assertion is nothing more than a hopeful, unsupported guess. Moreover, it ignores the well-

⁴⁷ Siwek Rebuttal Report ¶ 4.1.

⁴⁸ *Id.*

⁴⁹ Bazelon Report ¶ 44.

⁵⁰ Siwek Rebuttal Report ¶ 4.1.

⁵¹ Bazelon Report ¶ 46.

supported, easily quantifiable detriment to social welfare that will result if inmate service providers are not able to pay the site commissions on which so many state and local prisons rely.

With regard to a projected reduction in recidivism, which Dr. Bazelon quantifies at 1%, neither source on which Dr. Bazelon relies actually supports that belief. Mr. Siwek read both of those sources, and “**neither** source provides any evidence that increasing the number or length of inmate phone calls has any link to reduced recidivism.”⁵² The assertion thus is little more than Dr. Bazelon’s intuition. Moreover, Dr. Bazelon has no evidence to support his 1% figure.⁵³

Dr. Bazelon rests his projected “more effective prisoner management” benefit on a predicted substitution by inmates away from contraband cell phones to use of the secure inmate telephone system.⁵⁴ This prediction is simply not credible. As Securus has explained to the Commission, it is more likely that inmates attempt to use cell phones in order to evade security restrictions than to procure lower calling rates. In fact, evidence about illegal cell phone use in prisons suggests that evading security is the prime motivation:

The smuggling of cellphones into correctional facilities is not for the purpose of obtaining cheaper calls. That conclusion is evident from the amount of money that inmates will pay for illicit cellphones. In 2006, smuggling a cellphone into the New Jersey State Prison apparently required a **\$500** bribe to a corrupt correctional officer. “Inmates Smuggle in Cell Phones With Ease,” National Public Radio (Oct. 12, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6248833>. In Texas, an inmate’s mother recently has been convicted for smuggling cellphones into a Texas prison, apparently in exchange for **\$16,000**, most of which was used to bribe officers. “Inmate’s Mother Convicted For Cellphone Smuggling”, MeshDetect Blog, available at <http://prisoncellphones.com/blog/2011/06/13/inmates->

⁵² Siwek Rebuttal Report ¶ 5.2.

⁵³ *Id.* ¶ 5.3.

⁵⁴ Bazelon Report ¶ 49.

mother-convicted-for-cell-phone-smuggling. Plainly, money is not the issue.⁵⁵

Dr. Bazelon's prediction of demand substitution, which purportedly will inure to prison security, is not reasonable and thus should not be used by the Commission as it considers the rate decreases that the Wright Petitioners propose.

Dr. Bazelon's "social welfare" theory also fails to consider the effect of lost site commission revenue on both inmates and society at large. He acknowledges that site commissions result in approximately \$100 Million in revenue to state and local facilities.⁵⁶ In Securus's understanding, however, the actually aggregate amount of site commissions is \$500 Million annually. But certainly Dr. Bazelon must realize that a rate cap of \$0.20 per minute (he prefers \$0.07 per minute) would prevent carriers from paying site commissions; where at first that result may have been intuitive, now it is convincingly demonstrated by the Siwek Report filed by Securus in this proceeding. Dr. Bazelon blithely assumes that \$100 Million – in reality \$500 Million – can be obtained "from general tax revenues," but can provide no support for that assumption.⁵⁷

Comments from correctional authorities filed in response to the NPRM strongly counsel against any reliance on the public tax base as a replacement for site commissions. The Louisiana DOC flatly states that "no other funding would be available" for programs such as

⁵⁵ WC Docket No. 09-144, Letter from Stephanie A. Joyce to Marlene H. Dortch at 16 (Aug. 2, 2011) (attached as **Exhibit 13**) (emphasis in original).

⁵⁶ Bazelon Report ¶ 52 (citing Prison Legal News).

⁵⁷ *Id.* ¶ 52.

“specialized offender education”.⁵⁸ It states that \$997,849 in site commission revenue has been spent on “inmate welfare funds” at eight DOC sites.⁵⁹

The California State Sheriffs’ Association states that “[t]he phone rates are designed to provide a funding source to assist all inmates with various re-entry programs.”⁶⁰ It explains that “in California, the law requires any revenue received from inmate telephone contracts to be deposited in the Inmate Welfare Fund,” for “programs and services that directly benefit the inmates.”⁶¹ The Association concludes by stating that “[s]etting a rate structure would be detrimental to every department’s inmate welfare fund which would directly impact inmate programming.”⁶² It also makes the salient point that inmates do not pay taxes, and of course do not pay for their incarceration which, according to Dr. Bazelon, costs \$31,286 per inmate per year in state institutions.⁶³

The Idaho DOC explains that site commission revenue in that state goes to “an Inmate Management Fund,” such that “[a]ny changes in fee structure would result in reductions in services to offenders in Idaho.”⁶⁴

The Mississippi DOC states that in 2012, site commission revenue paid for:

1. Family Visitation
2. Education (ABE, GED and Vocational Education).
3. Alcohol & Drug Treatment

⁵⁸ Louisiana DOC Comments at 3.

⁵⁹ *Id.* at 4. \$2,819,202 in site commission revenue went to paying for prison operations. *Id.* at 3-4.

⁶⁰ Cal. SSA Letter at 1.

⁶¹ *Id.* (emphasis in original).

⁶² *Id.* at 2.

⁶³ Bazelon Report ¶ 48.

⁶⁴ WC Docket No. 12-375, Letter from Idaho Department of Corrections to Marlene H. Dortch, FCC, at 1 (Mar. 18, 2013).

4. Pre-Release Training
5. Discharge Assistance
6. Recreation⁶⁵

The California Department of Corrections and Rehabilitation makes a point that bears directly on Dr. Bazelon's "effective inmate management" theory: site commission revenues in that state pay for the Managed Access System (MAS) by which illicit cell phone use is detected and prevented.⁶⁶ If site commission revenue is no longer possible, then the service provider "can no longer afford to provide MAS, a necessary tool to fight prison-directed crime and harassment of victims".⁶⁷ Far from making prison management *more* effective, Dr. Bazelon's rate cuts would render authorities *less able* to ensure prisoner welfare and public safety.

Dr. Bazelon never even acknowledges that this result can occur, let alone quantifies how the loss of site commission revenue will affect "social welfare". Having left out fully half the social equation surrounding inmate rates, Dr. Bazelon's theories are not credible. Here again, Dr. Bazelon has not provided the Commission with any basis to adopt the theories in his report.

IV. FEES FOR PAYMENT TRANSACTIONS ARE OUTSIDE THE SCOPE OF THE NPRM AND DO NOT CONSTITUTE TELECOMMUNICATIONS SERVICES

The NPRM seeks comment about the rates for interstate inmate-initiated calls and the factors, such as site commissions, that affect those rates. Indeed, the name of this proceeding is "Rates for Interstate Inmate Calling Services". Nonetheless, some commenters step far

⁶⁵ WC Docket No. 12-375, Initial Comments of Mississippi Department of Corrections (Feb. 14, 2013).

⁶⁶ Cal. DCR Letter at 2.

⁶⁷ *Id.*

outside the scope of this proceeding to discuss fees for optional payment methods such as paying with a credit card over the telephone.⁶⁸ This matter is not properly before the Commission and is outside the Commission's jurisdiction.

The only charges about which the Commission seeks comment are interstate calling rates for inmate-initiated calls. The Commission neither mentions nor seeks information about fees for processing transactions. As such, this issue should not now be added to this proceeding.

Congress grants federal agencies considerable power to adopt legislative rules, and accordingly those agencies must adhere to "the degree of openness, explanation, and participatory democracy required by the [Administrative Procedure Act]."⁶⁹ More specifically, Section 553 of the APA requires that "[g]eneral notice of proposed rule making shall be published in the Federal Register," and such notice shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."⁷⁰ Section 553 further provides that

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making

⁶⁸ Wright Group Comments at 24-25; HRDC Comments at 8-9.

⁶⁹ *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (9th Cir. 1978). The *Weyerhaeuser* court explained

In short, we are willing to entrust the Agency with wide-ranging regulatory discretion, and even, to a lesser extent, with an interpretive discretion vis-a-vis its statutory mandate, so long as we are assured that its promulgation process as a whole and in each of its major aspects provides **a degree of public awareness, understanding, and participation** commensurate with the complexity and intrusiveness of the resulting regulations.

Id. at 1028 (emphasis added).

⁷⁰ 5 U.S.C. § 553(b).

through submission of written data, views, or arguments with or without opportunity for oral presentation.⁷¹

As the D.C. Circuit reads them, these statutory provisions require federal agencies to provide “sufficient notice” of a forthcoming rule that “affords interested parties a reasonable opportunity to participate in the rulemaking process.”⁷² Here, no notice of any kind was provided regarding payment processing fees or any other transaction fees. They should not be rolled into this inquiry now.

Transaction fees are not only outside the scope of this proceeding but also are outside the scope of the Commission’s jurisdiction. This agency’s mandate is “regulating interstate and foreign commerce in communication by wire and radio”.⁷³ Credit card processing fees plainly do not fall within that mandate. And though in some instances the Commission’s jurisdiction has expanded to include items such as Customer Proprietary Network Information and unauthorized change of presubscribed interexchange carrier (so-called “slamming”), those expansions were established by Congress in a new provision of the Communications Act.⁷⁴ It is telling that the commenters who wish to add transaction fees to this rulemaking fail to cite any authority to demonstrate that the Commission has the power to change those fees.

Because transaction fees were not presented in the NPRM, Securus has not provided the Commission with data regarding the fees applied to certain of its optional payment

⁷¹ *Id.* § 553(c).

⁷² *Forester v Cons. Prod. Safety Comm’n*, 559 F.2d 774, 787 (D.C. Cir. 1977).

⁷³ 47 U.S.C. § 151.

⁷⁴ *Id.* § 222 (“A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose ...”); *id.* § 258 (“No telecommunications carrier shall submit or execute a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.”).

methods. Securus notes, however, that it relies on third parties in order to offer these additional, more convenient payment methods. Securus is not a financial institution and does not have the ability to process credit cards on its own. The charges that Securus incurs from these necessary third-party financial entities – which apply on each and every transaction – are substantial. It would be incorrect to assert that these fees represent pure profit to Securus.

For all these reasons, the Commission should decline requests to expand the scope of this proceeding to include charges applied to items other than interstate inmate calls.

V. THE COMMISSION SHOULD NOT ADOPT RULES REQUIRING FREE TELE-TYPEWRITER (TTY) CALLS OR VIDEO PHONES

In its Comments, Securus provided a detailed explanation of how Tele-Typewriter (“TTY”) services are provided and of the rates applied to TTY calls.⁷⁵ Of the three types of TTY calls, two (TTY to Voice and Voice to TTY) are rated and billed by interexchange carriers at their rates for operator-assisted collect calls from public payphones.⁷⁶ These arrangements are regulated by state Telecommunications Relay Service (“TRS”) entities, under the supervision of the resident State Commission, and Securus has no control over these types of TTY calls other than making the connection – free of charge – to TRS.

Some commenters decry the rates and charges paid for TTY calls. They argue that hearing-impaired persons “pay disproportionately higher amounts” for inmate calls.⁷⁷ They

⁷⁵ Securus Comments at 23-25 & Hopfinger Decl. ¶¶ 6-13.

⁷⁶ Securus Comments at 24 & Hopfinger Decl. ¶¶ 10-11, 13. The Louisiana DOC concurs. LA DOC Comments at 7.

⁷⁷ WC Docket No. 12-375, Comments of Helping Educate to Advance the Rights of the Deaf (HEARD) at 2 (Mar. 25, 2013); *see also* Letter from the University of Denver Sturm College of Law Civil Rights Clinic to the Honorable Chairman Julius Genachowski at 2 (Mar. 25, 2013) (“The disproportionate impact of prison phone rates on Deaf and hard of hearing individuals is inconsistent with the Telecommunications Act of 1996 (‘Act’), regarding the provision of payphone services, codified at 47 U.S.C. § 276.”).

also argue that “[n]o prisoner should pay additional fees to use relay service,”⁷⁸ and that “[t]he [Americans with Disabilities Act] prohibits public entities from levying surcharges for the cost of auxiliary aids ... to provide a person with equal access to a program or service.”⁷⁹ A few Commenters also request that TTY calls should be free of charge, or that video phones must be made available.

Securus is not aware that “additional fees” or “surcharges” are being imposed on TTY calls. For its part, on the TTY calls it carries (TTY to TTY), Securus charges the same rates as for non-TTY calls.⁸⁰ With regard to those calls, Securus does not believe that it should be required to provide them free of charge. If the calls can be covered by a fund of some kind, like the TRS Relay fund, perhaps that mechanism would answer the concerns of the advocates who filed comments here. But to deprive Securus of all revenue on TTY to TTY calls would be an unlawful taking.⁸¹ To the extent any party suggests such a result, the Commission should not adopt it.

VI. CREATION OF AN FCC-SANCTIONED ADVISORY COMMITTEE WOULD BE HELPFUL AND APPROPRIATE

CenturyLink introduces the concept of “an ICS Federal Advisory Committee (ICS FAC)” that would “bring all stakeholders that have demonstrated an interest in this proceeding to

⁷⁸ HEARD Comments at 9; *but see* WC Docket No. 12-375, Comments of Consumer Groups in Response to Notice of Proposed Rulemaking at 4 (Mar. 25, 2013) (“The Consumer Groups are unaware of specific instances, aside from the record, where ICS providers have charged deaf or hard of hearing inmates additional fees for connecting to a relay operator.”).

⁷⁹ WC Docket No. 12-375, American Civil Liberties Union Comments at 4 (Mar. 25, 2013).

⁸⁰ Securus Comments at 24 & Hopfinger Decl. ¶ 12.

⁸¹ *See* Securus Comments at 20 (citing *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994)).

the table[.]”⁸² This approach seems appropriate.

As the Commission is aware, in May 2012 Securus met with several public interest organizations including Public Knowledge, the United Church of Christ, and the Leadership Council on Civil and Human Rights.⁸³ Attempts to convene a subsequent meeting were not successful.⁸⁴ And Securus is but one of five inmate telecommunications service providers that submitted comments in this proceeding. There are several more service providers that have not yet participated but would be affected by the outcome of this proceeding.

If convened in a formal, Commission-sanctioned manner, it would be productive to conduct group discussions regarding the complex, multi-jurisdictional issues that must be addressed in this docket. In the meantime, Securus has remained and is willing to meet with interested parties to discuss these matters.

⁸² CenturyLink Comments at 2.

⁸³ CC Docket No. 96-128, Letter from Stephanie A. Joyce to Marlene H. Dortch, FCC (May 18, 2012) (“Securus stated that it has met with the public interest groups that have shown an interest in inmate calling rates, and that it offered to hold another such meeting soon.”).

⁸⁴ **Exhibit 14** attached hereto (E-mail correspondence with Clarissa Ramon, Public Knowledge (June 7-15, 2012)).

CONCLUSION

For all these reasons, the Commission should not adopt the rate caps proposed by the Wright Petitioners. Were the Commission to take any action with regard to inmate calling rates, the results should not be applied to existing service contracts, should ensure that service providers recover all of their costs of service, and should provide the Commission with flexibility to review and approve rates for high-cost, low-volume facilities that service providers otherwise could not serve. The Commission should not adopt caps on transactional fees.

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